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Rochelle Waste Disposal, LLC *and* International Union of Operating Engineers, Local 150, AFL–CIO. Case 33–CA–15765

December 13, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE AND HAYES

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on February 9, 2009, the General Counsel issued the complaint on February 19, 2009, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 33–RC–5002. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Sections 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.[1]

On March 13, 2009, the General Counsel filed a Motion for Summary Judgment. On March 18, 2009, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

On April 30, 2009, the two sitting members of the Board issued a Decision and Order in Case 33–CA–15765, reported at 354 NLRB No. 18.[2] Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Seventh Circuit, and the General Counsel filed a cross-application for enforcement. The court of appeals, on its own motion, consolidated Case 33–CA-15765 with Cases 33–CA–15298 and 33–RC–5002, which were pending before the court pursuant to an earlier petition for review and cross-application for enforcement in those matters.[3]

On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB,* 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, the court of appeals remanded these cases for further proceedings consistent with the Supreme Court's decision.

On August 23, 2010, the Board issued a further Decision, Certification of Representative, and Notice to Show Cause in Cases 33–CA–15298, 33–CA–15765, and 33–RC–5002, which is reported at 355 NLRB No. 100. Thereafter, the Respondent filed a response to the Notice to Show Cause, and the Acting General Counsel and the Respondent filed a Joint Motion to Accept Stipulation as Parties' Compliance with Show Cause Notice.[4]

The Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis that the

[1] The Respondent's answer denies knowledge or information sufficient to form a belief concerning the filing of the charge in this proceeding. The Respondent admits, however, that it was served with a copy of the charge. Further, a copy of the charge is included in the documents supporting the General Counsel's motion, showing the date of this document as alleged, and the Respondent does not dispute the authenticity of this document.

The Respondent's answer also asserts that the Board lacks jurisdiction over this matter to the extent that the Charging Party failed to file a timely charge. However, the record shows that the charge was filed on February 9, 2009, which is within 6 months of the Respondent's December 10, 2008 refusal to bargain. Thus, the charge was timely under Sec. 10(b) of the Act.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

[3] On October 20, 2008, the two sitting members of the Board issued a Decision, Order, and Direction in Cases 33–RC–5002 and 33–CA–15298, reported at 353 NLRB No. 38. That decision adopted the judge's finding inter alia that the Respondent violated Sec. 8(a)(3), (4), and (1) by discharging employee Jeff Jarvis, and directed the Regional Director to open and count Jarvis' ballot, prepare and serve a revised tally of ballots, and issue an appropriate certification. Following the October 20, 2008 Decision, Order, and Direction, the parties entered a settlement agreement that satisfied the backpay and reinstatement obligations of the Order.

[4] In response to the Notice to Show Cause, the Respondent filed a statement of reasons why the Board should not grant the General Counsel's Motion for Summary Judgment. The motion reiterates the Respondent's position taken in its answer to the original complaint, in which the Respondent denied that the Union was properly certified by the Board.

In their joint motion, the Acting General Counsel and the Respondent stipulate to amendments to the complaint and the answer to conform with the current state of the evidence. Specifically, the Respondent admits that the Union was certified on August 23, 2010, that the Union continues to request that Respondent recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, and that Respondent continues to refuse to recognize and bargain with the Union as requested.

Union was improperly certified in the representation proceeding.[5]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[6]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times the Respondent, a corporation with an office and principal place of business in Rochelle, Illinois (the Respondent's facility), has been engaged in the business of providing waste disposal services.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations described above, purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Illinois.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, International Union of Operating Engineers, Local 150, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on February 1, 2007, the Union was certified on August 23, 2010, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time heavy equipment operators including the scale operator and the landfill supervisor employed by the Employer at the Rochelle Municipal #2 landfill in Rochelle, Illinois, EXCLUDING temporary employees employed through a temporary agency, office clerical and professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

About November 18, 2008, the Union, by letter, requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about December 10, 2008, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that this failure and refusal constitutes an unlawful failure and refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.[7]

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

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[5] The Respondent's answer denies par. 5(a) of the complaint which sets forth the appropriate unit. The Respondent also denies the appropriateness of the unit in its response. The unit issue, however, was litigated and resolved in the underlying representation proceeding. Accordingly, the Respondent's denial of the appropriateness of the unit does not raise any litigable issue in this proceeding.

[6] Thus, we deny the Respondent's request that the complaint be dismissed.

[7] In *Howard Plating Industries*, 230 NLRB 178, 179 (1977), the Board stated:

> Although an employer's obligation to bargain is established as of the date of an election in which a majority of unit employees vote for union representation, the Board has never held that a simple refusal to initiate collective-bargaining negotiations pending final Board resolution of timely filed objections to the election is a *per se* violation of Section 8(a)(5) and (1). There must be additional evidence, drawn from the employer's whole course of conduct, which proves that the refusal was made as part of a bad-faith effort by the employer to avoid its bargaining obligation.

No party has raised this issue, and we find it unnecessary to decide in this case whether the unfair labor practice began on the date of Respondent's initial refusal to bargain at the request of the Union, or at some point later in time. It is undisputed that the Respondent has continued to refuse to bargain since the Union's certification and we find that continuing refusal to be unlawful. Regardless of the exact date on which Respondent's admitted refusal to bargain became unlawful, the remedy is the same.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning on the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); and *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Rochelle Waste Disposal, LLC, Rochelle, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Union of Operating Engineers, Local 150, AFL–CIO, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time heavy equipment operators including the scale operator and the landfill supervisor employed by the Employer at the Rochelle Municipal #2 landfill in Rochelle, Illinois, EXCLUDING temporary employees employed through a temporary agency, office clerical and professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Rochelle, Illinois, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.[9] Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 10, 2008.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 13 2010

Wilma B. Liebman,	Chairman
Mark Gaston Pearce,	Member
Brian E. Hayes,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[9] For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Union of Operating Engineers, Local 150, AFL–CIO, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time heavy equipment operators including the scale operator and the landfill supervisor employed by us at our Rochelle Municipal #2 landfill in Rochelle, Illinois, EXCLUDING temporary employees employed through a temporary agency, office clerical and professional employees, guards and supervisors as defined in the Act.

ROCHELLE WASTE DISPOSAL, LLC